84-513

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No.

In the
Supreme Court of the United States

October Term 1984

UNITED STATES OF AMERICA

Plaintiff/
Respondent

vs.

ROBERT EARL MILLER

Defendant/
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Kranitz & Kranitz, PC
107 S 4th Street
St Joseph, Mo 64501
Theodore M Kranitz
(member of this
court)
Hugh D Kranitz

31 pp

QUESTIONS PRESENTED

1. Did the trial court indicate vindictiveness and bias toward defendant upon his resentencing by imposing the same maximum sentence and fine as provided by law as he did in the original sentence which was vacated?

2. Is a defendant entitled to a redetermination of all of the issues on appeal when his conviction is remanded because the trial judge failed to impose a sentence on a sustained conviction?

3. Is petitioner's conviction of conspiracy to transport unlawful explosives in violation of 18 USC Sec 371, 842(a)(3)(A) barred by collateral estoppel insofar as petitioner was acquitted of conspiracy to manufacture and to store?

4. Is there sufficient evidence to convict petitioner of conspiracy to transport unlawful fireworks when the only evidence of trial equally supported the inference that petitioner transported legal fireworks?

5. Does the doctrine of lenity apply to petitioner to bar his conviction under 18 U.S.C. Sec 371, 842 insofar as there is a lesser statute which

would equally apply?

6. Is the indictment under which petitioner was charged fatally defective because it fails to allege any overt act and furtherance of a conspiracy to transport?

PARTIES TO PROCEEDING BELOW

The United States of America, plaintiff, and Robert Earl Miller, defendant, were the parties to the proceedings below as well as Victor A Scharstein and William L Walters, both of whom were co-defendants of defendant petitioner herein.

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OPINION BELOW

The opinion of the United States Court of Appeals rendered April 9, 1984 is an unpublished

decision. The original slip opinion is contained in the appendix to this petition.

JURISDICTIONAL STATEMENT

In United States of America v Miller, the United States Court of Appeals entered an order and opinion reversing petitioner's conviction for conspiracy to manufacture illegal fireworks in violation of 18 U.S.C. §871, 842(a)(1) and remanded the case for the entry of a judgment of conviction under U.S.C. §371, 842(a)(3)(A) (conspiring to transport) and for sentencing thereunder. Upon resentencing the trial court imposed the maximum sentence permitted at law and from that final judgment a new appeal was taken by petitioner, being case #83-5565 in the United States Court of Appeals for the Sixth Circuit. The appellate court affirmed the judgment of conviction and petitioner filed a motion for rehearing which was denied on May 22, 1984. The petition is being filed within 60 days of the rendering of the final judgment in this case as required by Supreme Court Rule 20. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved in this case are:

The constitutional doctrine giving this court the supervisory power over questions of federal law ruled upon by the inferior federal courts, Article 3 §1; and due process of law, Amendment V, U.S. Constitution.

STATUTES INVOLVED

18 U.S.C. 371; 18 U.S.C. 842; 15 U.S.C. 1261

STATEMENT OF THE CASE

Petitioner was indicted in one count of violation of 18 U.S.C. §371, 842. Three separate charges were submitted to the jury: Conspiracy to manufacture; conspiracy to transport; and conspiracy to store (unlawful fireworks without a license). The jury acquitted petitioner of conspiracy to store and found him guilty of conspiracy to manufacture and conspiracy to transport unlawful fireworks without a license. The trial court convicted and sentenced petitioner Miller only of conspiracy to manufacture. The United States Court of Appeals for the Sixth

Circuit in Case No 81-5861 set aside Miller's conviction for conspiracy to manufacture upon a failure of proof and discharge petitioner on said conviction, remanded the case for resentencing under conspiracy to transport under violation of 18 U.S.C. §371, 342(a)(3)(a). Upon resentencing, petitioner Miller was sentenced to the same maximum allowable by law and took his appeal from that conviction in Case No 83-5565. After oral argument, the United States Court of Appeals for the Sixth Circuit in a per curiam decision sustained Miller's conviction of a conspiracy to transport and sustained the sentence imposed by the trial court.

REASONS FOR GRANTING THE WRIT

I.

It is petitioner's contention that by imposing the same sentence in the remand hearing for sentencing that was imposed on him for the crime of conspiracy to manufacture, the Court violated the provisions of North Carolina v Pearce (citations) 395 US 711, 23 LEd 2d 656, 89 SCt. 2072 in that the

trial court intended to show vindictiveness and bias toward defendant. The original convivction, which was vacated by the court of appeals, was for a crime which carried with it a more severe connotation, if not range of punishment. However, the Court of Appeals vacated that on the question of sufficiency of the evidence.

The Pearce concept is that due process requires complete objectivity and non-bias at any sentencing stage. To increase punishment after a successful appeal is prima facia evidence of vindictiveness and bias on the part of the trial judge and in violation of defendant's due process rights in prosecuting an appeal.

Here, in no less a violation, defendant was sentenced to the same maximum permitted by law without either a new pre-sentence investigation or taking into account the less severe and dangerous surrounding circumstances attended upon the alleged crime. Not only was he sentenced to the maximum time of incarceration but he, and only he of all the defendants, was sentenced to pay the fine of

$10,000.00 (which is also the maximum allowed by law) and fined because of his ability to pay-S.p 42,45.

> "U.S. v Sockel 368 F. Supp, 97 page 97: In that memorandum the Solicitor General stated that the construction placed on 3568, Title 18, U.S. Code, by both the 8th Circuit in Nelson and by the 2nd Circuit in Cains was inconsistent 'with the spirit of numerous decisions of this Court requiring that justice be applied to all persons equally and not on the basis of ability to pay,' citing Williams v Illinois, 399 U.S. 235, 241 90 S Ct. 2018, 26 L.Ed. 2d 586."

It should be noted that no other defendant was sentenced to pay a fine. This failure to take into account the less severe and dangerous surrounding circumstances of the crime and imposition of a fine upon this petitioner alone constitutes an obvious disregard for defendant's rights to due process in that the District Court's imposition of the same maximum sentence revealed vindictiveness and bias

toward either the crime or the defendant. Vindictiveness and/or bias, of course, need not be conscious. It may simply be "a possible appearance of vindictiveness." Longvall v Meachum, 651 F2d 818, 821. In the case at bar, the unconstitutional taint cannot be ignored and at the very least the matter should be remanded for further sentencing under a new judge.

II.

The Court of Appeals in its opinion of April 9, 1984 stated that "the purpose of its remand was merely to require the District Court to correct an obvious clerical error in the judgment entered following the first trial." However, it is defendant's contention that a mere technical error or clerical mistake cannot be the grounds for a failure of the Court of Appeals to exercise its duty in jurisdiction. There is a long-standing legal concept that where there is no final judgment there can be no appeal and that there is no final judgment in a criminal case for which an appeal can be taken until sentence has been imposed. Helmich v Nibert 543 FSup 725; U.S.

v Decker, 322 FSup 419; Corey v United States 84 SCt 298, 374 U.S. 169, 11 LEd 2d . In the case at bar, petitioner was never sentenced on the conspiracy to transport until the remand and thus there was no final judgment. Therefore, any appeal which was had originally was premature and of no legal effect. Although there are obviously similarities of issues in both the first appeal and the second appeal, it is unmistaken that the issues raised in the second appeal were directed toward the conspiracy to transport and not to the conspiracy to manufacture. To deny petitioner his right to have those issues presented in light of the conspiracy to transport is a denial of due process of law. However, the Court of Appeals treated those issues as if they were dead issues, already determined by a prior decision. The case, however, remained alive until the judgment became final, and since there never was a judgment as contemplated by the rules, the appeal to the Sixth Circuit together with all of the issues raised therein were appropriate, alive,

and ripe for determination. McDonald v Moinet 139 F.2d 939.

III.

Petitioner submits that his conviction of conspiracy to transport should be barred by collateral estoppel as he has already been acquitted of conspiracy to manufacture and conspiracy to store. The facts supporting this allegation are more fully set forth in petitioner's argument concerning the sufficiency of the evidence. The government alleged, and it was their theory at trial, that petitioner and others were involved in a conspiracy to manufacture, store and transport unlawful explosives. There was no evidence, either direct or circumstantial, that petitioner ever had any conversations, planning sessions or schemes with the co-defendants involving the manufacture, storage, or interstate transportation of "unlawful" fireworks. The government's entire case rested on the evidence that Petitioner sent the co-defendants money and later came to Kentucky to receive boxes (the contents of which were unknown). Petitioner is a

seller of legal fireworks in DeKalb, Missouri. It was the government's theory that since the money sent by petitioner to the co-defendants was sent before the manufacturing of the illegal fireworks occurred, that petitioner was conspiring to manufacture and store these illegal fireworks. The jury rejected this inference in acquitting petitioner of conspiracy to store the fireworks and the Court of Appeals acquitted petitioner of conspiracy to manufacture the same. Thus, there has been a finding that petitioner did not conspire to have produced, for him, a quantity of unlawful fireworks. Likewise, then, there is no evidence that petitioner conspired to purchase or receive these alleged unlawful fireworks. As the inference advanced by the government at trial has been rejected, the inference cannot now be resurrected to support a conviction for conspiracy to transport. Ashe v Swenson, 397 US 436 (1970).

IV.

Certiorari is required insofar as petitioner Miller contends there was insufficient evidence of a

conspiracy to "transport" in violation of 18 U.S.C. §372, 842(a)(3)(A). A conspiracy to "transport" requires that petitioner Miller plan a scheme with others to receive, transport, and store or sell illegal fireworks in an illegal manner. Each element of a conspiracy must be proved beyond a reasonable doubt. U.S. v Salinas-Salinas, CA5, 1977, 444 F2d 470. It is respectfully submitted that the Court of Appeals in its order of affirmance overlooked the fact that there was no evidence adduced at trial which could be interpreted as proving beyond a reasonable doubt that an agreement existed between, or among, the conspirators and petitioner to transport explosive materials without a license across state lines. Inferences cannot be piled one upon the other to so conclude. U.S. v Ingram, 360 U.S. 672, 678; 3 LEd.2d 1503, 1508; 79 SCt. 1314. The jury acquitted petitioner Miller of conspiracy to "store" and the lower Court acquitted petitioner Miller of conspiracy to "manufacture." Since there was no evidence of Miller's guilt for the substantive offense, there must be some proof, either direct or

circumstantial, of a plan to knowingly transport unlawful fireworks. The government's "proof" of this scheme is the same as the government's insufficient proof of a plan to manufacture (i.e., that Miller purchased fireworks and picked up fireworks without evidence that the fireworks Miller received were illegal). If the government could have proved that petitioner Miller received unlawful fireworks, they could have convicted him of the substantive offense; they did not have such proof. In fact, there was no evidence which led to any inference that petitioner Miller was anything more than an innocent purchaser of lawful fireworks. Since there is no permissible inference of a conspiracy to "manufacture" or to "store," and since there is no inference of transporting unlawful fireworks, there can be no logical, legal or permissible inference of a conspiracy to "transport" unlawful fireworks.

In support of the foregoing, the following facts are presented:

First, there was no evidence that Miller ever possessed unlawful fireworks. In fact, Agent Rapier testified (Tr. 620, App. 296):

> "Q. Have you ever found any M-80's, illegal M-80's on Mr Miller's property?
>
> "A. No, sir, I have not.
>
> "Q. Have you ever found any illegal M-100's on (tr. 621, App. 297) his property?
>
> "A. No, sir, I have not.
>
> "Q. Have you ever found any illegal firecrackers at all on Mr Miller's property or in any of his automobiles or anything else?
>
> "A. No, sir, I have not."

There was no proof of any kind during the trial that anything was ever found on either Fenton or petitioner Miller's property, and no proof that either Fenton or petitioner Miller ever sold or planned to sell anything illegal.

The trial court even expressed doubt about the sufficiency of the government's "transporting" case (Tr. 358):

> "I'm going to allow it (Government witness Fenton's statement) to be admitted.
>
> I'm specifically reserving, however, on whether

that's enough to constitute an offense on this indictment.

I'm going to consider very seriously the motion that will come at the end of the case if that's all you have got....."

The linchpin of the government's case was the inference that Miller transported unlawful M-80's and M-100's. There was no proof of this.

Most of the government's evidence in this case came from people who were directly involved in the manufacture of illegal M-80 and M-100 firecrackers. Ellen Orta, David Herald and his wife, who were undoubtedly the government's star witnesses, struck a deal with the government, and in return for their testimony various counts were dismissed and they were permitted to enter a plea of guilty to one count each.

Mr Herald worked in almost every phase of the operation, including the manufacturing of 600 trays for M-80 and M-100 fireworks in January and February, 1981. At one point in this operation, he even kept the equipment for the manufacturing in his own garage. He delivered and unloaded the tubes to the garage on John Street where the powdering took

place, and sometimes the glueing of the second end, except some of it also took place in his own garage at home. After the glueing was finished and dried, (three to four days), the tubes were wicked in Herald's garage.

Ellen Orta testified that no operation took place between Christmas, 1980, and March, 1981.

Mr Herald testified that after the operation started back up, the powdering took place at John Street. This residence was rented on March 12, 1981. One day after Herald moved supplies in, as he testified, the powdering started (March 13, 1981). He testified that the fireworks required one day to power (March 14), then they had to start glueing the second end and they had to dry three to four days again, (March 17 or 18). The fireworks would then be wicked, which was the slowest process and took some time, then they were bagged and boxed. This would make the finished product coming out of production no earlier than March 19. No matter how many trays they had, by Mr Herald's testimony, none was produced before this date,

because Mr Herald testified the equipment was stored in his garage, and no illegal powdering was done anywhere other than at the John Street location in March of 1981.

According to the evidence adduced at trial, (Herald's testimony), he did not know when petitioner Miller was there. He stated that it could have been sometime in the middle of March, or around March 14. Thus, it would have been impossible for petitioner to have received illegal fireworks.

Another difficulty with the government's proof concerns what Miller received. There was obviously no proof that Miller received illegal fireworks. If there had been such proof, the government could have prosecuted him for that. Then what did Miller receive? If he received legal fireworks, he could not be guilty under 842(a)(3)(A). There must be proof, sufficient to exclude the reasonable hypothesis of innocence that Miller planned to purchase legal fireworks - that he indeed conspired to transport illegal fireworks. Of this, there was none.

Miller advanced the theory that what he picked up were legal class c fireworks and the government had no evidence whatsoever to rebut this. In an attempt to counter the government's circumstantial evidence of a sale in Missouri of illegal fireworks, by showing that sale was one of toy or fake M-80 and M-100 fireworks, the court interceded and denied him the right to do so.

These toy M-80's are described on petitioner Miller's price list, Exhibit 5 (Tr. 733, Addendum to Joint Appendix 16-22). They are set out on page one of the price list (Add. Jt. App. 19) on the lower right hand corner of the page.

Petitioner Miller brought samples of all of the above toys to be entered into evidence, and they were stored during the trial in the U S Marshall's office. The Trial court, however, entered an order enjoining petitioner's counsel from introducing them.

And yet the Court permitted the government to argue whether the toy M-80's and toy M-100's were or are "fake" or "phonies." Not permitting the

introduction, but allowing the argument was error and prejudiced.

In reviewing the evidence of the government's case against petitioner Miller, one can find nowhere the proof of any facts from which reasonable minds could conclude beyond a reasonable doubt constituted knowledge and guilt of the alleged conspiracy. Therefore, there was insufficient evidence to sustain a conviction.

Petitioner filed a motion to dismiss the indictment for lack of evidence at the close of the government's case. (The Court reserved its ruling thereon, in error as held in U.S. v Day (1971) 438 F2d
121, and Court admitted to this error at the Resentencing. (Resent. Tr. P. 24-25).

V

During the course of the government's prosecution of petitioner, the United States attempted to prove that he conspired to manufacture, deal, transport and store explosive materials. The United

States also attempted to prove that he actually engaged in the business of manufacturing and dealing in explosive materials. Throughout this case, both at the pre-trial stage and during the evidence at trial, the United States through its witnesses continually referred to the explosive material as M-80 and M-100 firecrackers containing a perchlorate mixture, commonly known as flash powder. (Tr., P. 69, P. 355, P. 520). In order to determine whether or not a prosecution such as this can be successful, it is necessary to determine whether M-80 or M-100 firecrackers are prohibited under Title 18 U.S.C. Sec. 842 et seq. An analysis of the statutes in question, the Federal regulations enacted thereunder, and the legislative history make it clear that the manufacture, distribution, transportation and storage of such fireworks have been excluded from the prohibition set out under 18 U.S.C. Sec. 841.

Title 18 U.S.C Sec. 841 et seq, and the regulations promulgated thereunder do not deal with either M-80 or M-100 firecrackers and do not prohibit or ban those items. Section 841(d) mandates that

the Secretary of the Treasury shall annually publish in the Federal Registry a list of all explosives banned under the act, (Emphasis supplied). Webster's Third New International Dictionary defines "ban" as meaning "to prohibit especially by legal means..." A copy of the Treasury Secretary's list of explosive materials, as published in Volume 45 #155 of the Federal Registry, Page 51976 (Friday, August 8, 1980), was introduced as Exhibit 55 for the Government. Nowhere does it ban either M-80 or M-100 fireworks as explosive materials. The trial court ruled at trial, however, that those items were explosive materials within the meaning of the act.

In its opinion of January 22, 1983, the trial court seems to base its ruling on the proposition that these materials are banned because they "...were a device or chemical compound mixture which had the common purpose to function explosion." Further, the trial court found that the powder contained in the devices was an explosive powder known as a "perchlorate explosive mixture." This reasoning is clearly erroneous based upon the

testimony at trial. Agent Dale Beam stated that perchlorate explosive materials were components of fireworks other than M-80 and M-100 firecrackers. (Tr..., P. 123-124). George Peterson, an ATF chemist, testified that the perchlorate mixture known as flash powder was an ingredient of common fireworks. (Tr., P. 370-371). Roy Parker, the government's own expert, stated that perchlorate mixtures were used throughout the fireworks industry (Tr., P. 520) and that it was the Consumer Products Safety Commission that regulated the amounts of perchlorate mixtures that could be contained in various types of firecrackers. (Tr., P. 536). Finally, Mr Parker stated that the components of flash powder were readily available on the open market (Tr., P. 538). Thus, it can be seen that the perchlorate mixtures, which are regulated by various departments of the government, are not banned. Rather, Title 15 U.S.C. Sec. 1261 et seq known as the Federal Hazardous Substance Act, prohibits introduction into interstate commerce of such hazardous substances.

The Secretary of Health and Welfare is mandated to publish in the Code of Federal Regulations a list of hazardous substances; 16 CFR Sec. 1500 et seq, specifically lists as bannned goods or substances, M-80 and M-100 firecrackers as follows:

> "Fireworks devices intended to produce audible effects including but not limited to cherry bombs, M-80's, salutes, silver salutes, and other large fireworks designed to produce audible effects and including kits and components intended to produce such fireworks if the audible effect is produced by a charge of more than two grains of pyrotechnic composition. 16 CFR Sec. 1500.17(a)(3)."

Further, the Court's attention is directed to the case of United States v Chalarire, 316 FSupp. 543 (E.D. La. 1970), wherein the U S District Court for the Easter District of Louisiana concluded that "...cherry bombs and silver kings were banned by the Federal Hazardous Substance Act from being introduced into the channels of interstated commerce." Although Chalarire does not specifically deal with M-80's and M-100's, silver kings and cherry bombs are Class B fireworks which contain flash powder (perchlorate explosive mixtures), the very same type of explosive which the government

produced at trial. Further, in the Chalaire opinion, the Court stated at page 547:

> "Silver kings and cherry bombs are toys within the meaning of the Federal Hazardous Substance Act. The Act itself expressly excludes Class C (common) fireworks, but not Class B fireworks. Also, the legislative history of the act clearly states that Congress intended to include silver kings and cherry bombs (Class B fireworks) within the definition of toy."

Finally, this prosecution was based on the premise that the activities of the petitioner were carried on without a license. Nevertheless, throughout the trial, the United States contended that those same activities could never have been licensed. (Tr., P. 512, P. 539). If, in fact, the complained of activities were not subject to the licensing requirements, then the rhetorical question is asked: How could the activities for which this indictment was brought be within the purview of that statute? Thus, the indictment was not properly brought under the correct statute.

Because 18 U.S.C. Sec. 841-848 are silent as to the type of fireworks that are the subject matter in this case; because the Federal Regulations as set out in Government's Exhibit 55 do not list such

firecrackers on the list of banned explosive materials; and because perchlorate mixtures are not banned but are, in fact, regulated by other governmental departments, those sections in no way prohibit the manufacture, assembly, or storage of M-80 or M-100 fireworks. If prohibited, such conduct is prohibited under the Federal Hazardous Substance Act as set out in Title 15 of the United States Code and this prosecution should have been brought thereunder.

Because both 18 U S Sec. 841 et seq and 15 U.S.C. Sec. 1261 et seq., regulate the same conduct, the Court should have applied the doctrine of lenity in the disposition of the motion for directed verdict of acquittal. To do so the Court should have considered not only the wording of the related statutes but the congressional intent in enacting the statutes.

The rule of lenity does not apply unless there is a genuine ambiguity in a criminal statute that cannot be resolved by consideration of the statutory language and legislative history and that an

ambiguity arises by the failure of 18 U.S.C. Sec. 841 et seq, and the promulgated regulations thereunder, to specifically delineate M-80 and M-100 firecrackers as covered thereunder. There is no question, however, as to whether 15 U.S.C. Sec. 1261 et seq, and the subsequent regulations, prohibit the distribution and transportation of those same fireworks. The prohibition is specifically set forth in 16 CFR 1500.17(a)(3), as argued in the preceding section of this brief.

Whenever two statutes overlap, and the government contends that one proscribes inferentially the same conduct that the other specifically prohibits, ambiguity must arise. Thus, within the doctrine of lenity is the concept that where overlapping statutes prohibit the same conduct and prescribe different punishment, and one is less harsh than the other, the conflict must be resolved by applying that statute which imposes the least harsh punishment. Prince v United States 352 U.S. 322, 370 (1957). Further, in Rewis v United States,

401 U.S. 808 (1971) at 812 the Supreme Court states:

> "Ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity." See also: Bell v United States, 349 U.S. 81 (1955). In United States v Culbert, 435 U.S. 371 (1978) at 379, the Court once again stated: "It is true that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

A reading of the legislative history of both acts shows that firecrackers were never considered when 18 US Sec. 841 was before the appropriate congressional bodies. M-80's and M-100's had already been banned, except for certain uses, under 15 U.S.C. Sec. 1261 and had been so banned for at least four years prior to the passage of the act. However, the history of 15 US Sec. 1261 "clearly shows that Congress intended to include (Class B fireworks), United States v Chalaire, 316 FSupp. 543, 547 (E.D. La. 1970)." Not one recorded word can be found that ever mentioned the items herein under

consideration in the legislative history of Title XI of Public Law 91-452.

Here the government, through creativity or a special prosecutorial enthusiasm, attempts to bootstrap otherwise minor criminal conduct into a major felony. This cannot be done.

Where the matter is not free from doubt, the issues must be resolved in favor of lenity. Whalen v United States, 445 U.S. 684 (1980). A citizen must be properly put on notice of what the law requires of him if he is to be held accountable for disobedience of those requirements. If that law is so ambiguous that it does not properly inform the citizen of what is expected of him in the form of lawful behavior, he must constitutionally be protected from over zealousness of the prosecutor. We can only afford this petitioner his constitutional protection by interpreting these statutes in accordance with the evident intent of the Congress in enacting them.

By applying the doctrine of lenity and by looking at the legislative intent behind both 18

U.S.C. Sec. 841 and 15 US Sec. 1261, the ambiguity present in these overlapping statutes must be resolved in favor of the petitioner. To allow such a prosecution is to permit the United States Attorney to put himself in place of the Congress and the court, proceed with his own interpretation of the clearly conflicting statutes, and enhance the alleged offense from what Congress clearly intended to be a misdemeanor into a felony.

VI.

Petitioner also complains that the failure to allege an overt act is ground for dismissal of the indictment. As a result thereof, the courts have held that an indictment simply charging a conspiracy following the statutory language is insufficient. It must also contain an adequate statement of an overt act to effectuate the object of the conspiracy. U.S. v Storkel (1970) 430 F. 2d 262; U.S. v Root, 366 F 2d 377.

The object of the conspiracy charged in this indictment is obviously to effect the interstate transportation of explosive materials. Yet the government

failed to allege in the indictment any relevant overt acts in reference to the same. In the overt acts portion of the indictment, the government set forth no less than fifteen alleged overt acts. Petitioner Miller, however, was an alleged participant in only two of those. They are set forth as follows:

> "8) On or about March 8, 1981, Victor Forrest Scharstein, contacted REM in DeKalb, Missouri and as a result of said contract, on or about March 9, 1981, caused to be wired to VFS the sum of $1,750.00, via Western Union, to finance the further manufacture of a quantity of illegal explosives. (Emphasis added.)
>
> "9) On or about a date in March 1981, subsequent to March 9, 1981, Robert Earl Miller traveled to Silver Grove, Kentucky in the Eastern District of Kentucky and received from Victor Forrest Scharstein 125 cases, more or less, of illegally manufactured M-80 firecrackers. (Emphasis added.)"

No other overt acts against Miller are alleged.

Taking each allegation of overt act separately, it can be seen:

1. That the first act alleged deals specifically with the conspiracy to manufacture. The court of appeals held in its prior order that the government failed in its case therein.

2. That the second act alleged deals simply with the receiving of merchandise. Nowhere is it alleged that said merchandise was transported across state lines, nor that anyone entered into an agreement to do the same.

In fact, Assistant United States Attorney Rawlins stated at trial, at a bench conference, the following:

> "THE COURT:***Isn't he indicted for transporting these things in interstate commerce?
>
> "Mr Rawlins: No. He's indicted for conspiracy. Conspiracy is - one of the charges is causing them to be transported in interstate commerce but he's not charged with transporting them. Because I can't prove that he left Kentucky with them directly.
>
> "The inference is obvious that he left Kentucky and went home at some point in time but I can't prove that, I've no witness who can prove that. Therefore, I've got a situation where I want to show that one, he knew they were illegal and two, these were not the kind of fireworks they are going to claim they are and three, that close in time he handled these same types of items out in Missouri."

I'm not charging it as a crime but as evidence of a plan, scheme, design, knowledge, these types of things. (Tr. V II pp. 318-321).

As can clearly be seen from this exchange, not only did the Government fail to allege an overt act in reference to transportation, but it was never a part of the theory of its case. The entire theory was the conspiracy to manufacture. That was admitted by the United States at trial. Not one word of testimony was elicited in reference to an agreement to transport anything involving petitioner Miller.

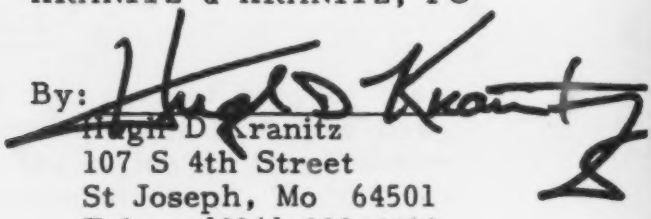
It has oft been stated that the essence of a conspiracy is an agreement, Iannelli v U.S., 956 SCt. 1284, 420 US 770, 43 LEd2d 616 (1975). No agreement was shown; no overt act was alleged or shown; and no evidence was presented in reference to a conspiracy to transport regarding Miller.

CONCLUSION

WHEREFORE, petitioner Miller, for the reasons pressed herein, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit; and for such other and further relief as to this Court may seem meet and proper in the premises.

Respectfully submitted,

KRANITZ & KRANITZ, PC

By: 

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petition for Certiorari was this 27th day of [illegible], 1984, mailed to the office of the Solicitor General, 10th & Constitution Avenue, Washington D.C. 20530, by depositing same in a regularly maintained U.S. Mail Depository.

KRANITZ & KRANITZ, PC

By: [signature]
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Attorney for Appellant

ABSTRACT - ORDER

No. 83-5565

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America	Plaintiff/Appellee	)
		)
-v-		:
		)
Robert Earl Miller	Defendant/Appellant	)

Decided and Filed 9 April 1984

BEFORE: LIVELY, Chief Circuit Judge;
CONTIE, Circuit Judge; and

WEICK, Senior Circuit Judge

PER CURIAM, Miller appealed his 1981 conviction for conspiracy to manufacture, deal in, and transport explosives without a license. This court affirmed the conviction on the charge of conspiring to transport or ship explosive materials in interstate commerce and reversed the conviction for conspiring to manufacture or deal in explosive materials upon a finding of insufficient evidence. The entire conspiracy charge was contained in a single count of the indictment. In an unpublished order the court remanded the case to the district court to correct its judgment which showed that Miller was sentenced only for conspiring to manufacture or deal in explosive materials without a license. Upon remand, the district court imposed the same sentence that it had previously imposed at the time of the jury verdict but showed in its order that the sentence was for Miller's conviction for conspiring to transport or ship explosive materials without a license only.

Miller has appealed from the second judgment of the district court, arguing that the district court violated the rule of North Carolina v. Pearce, 395 U.S. 711 (1969), by imposing the same sentence for a valid conviction of one charge as it had previously imposed on the basis of a jury verdict of guilty on two charges after this court had held that the conviction on one of the charges was not supported by substantial evidence. We believe that Miller seeks a broad reading of North Carolina v. Pearce which is not justified by the language or the holding of that case. Pearce prohibits a court, upon return of a case after reversal of a conviction, from imposing a more severe sentence without placing on the record its reasons for doing so based on objective information justifying an increase in the penalty imposed. Id. at 726. Pearce is aimed at vindictiveness. In the present case the district court merely reaffirmed its previous judgment that participation in any part of the conspiracy merited the prison sentence and fine first imposed. There was no indication of vindictiveness.

Miller also argues that this court had no jurisdiction over the first appeal because the judgment was invalid and on this basis attempts to reargue issues which were decided in favor of the government on the first appeal. This argument is flawed. This court had jurisdiction over the first appeal and the purpose of its remand was merely to require the district court to correct an obvious clerical error in the judgment entered following the first trial.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal this court concludes that no errors prejudicial to the rights to the defendant Miller occurred following remand.

The judgment of the district court is affirmed.

No. 83-5565

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America	Plaintiff/Appellee
-v-	
Robert Earl Miller	Defendant/Appellant

Decided and Filed 22 May 1984

BEFORE: LIVELY, Chief Circuit Judge;
CONTIE, Circuit Judge; and
WEICK, Senior Circuit Judge

ORDER

No judge in regular active service on the court having moved for en banc consideration of the petition for rehearing filed herein by the defendant-appellant, Robert Earl Miller, the petition has been referred to the hearing panel. Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of this appeal and rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

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No. 83-5565
No. 81-5861
No. 82-5359

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America Plaintiff/Appellee)
)
)
-v- :
)
)
William Ledford Walters)
(81-5860))
Robert Earl Miller)
(81-5861))
Victor Forest Scharstein)
(82-5359) Defendants/Appellants)
)

Decided and Filed 3 Dec 1982

BEFORE: LIVELY, Chief Circuit Judge;
PHILLIPS and BROWN, Senior Circuit. Judges.

ORDER

The appellant in No. 81-5860, William Ledford Walters, was convicted at a jury trial of conspiracy to manufacture, deal, transport, and store explosive materials without a license and of manufacturing and dealing in explosive materials without a license in violation of 18 U.S.C. §§371 and 842(a)(1). The appellant in No 82-5359, Victor

Forest Scharstein, was also convicted by the jury of violating 18 U.S.C. §§371 and 842(a)(1) and in addition of transporting explosive materials without a license in violcaiton of 18 U.S.C.§842(a)(3)(A). The defendant in No. 81-5861, Robert Earl Miller, was indicted in count one only of conspiracy to manufacture, deal, transport and store explosive materials without a license. The jury found Miller guilty of conspiring to engage in the business of manufacturing and dealing in explosive materials without a license and of conspiring to transport and ship such materials in interstate commerce, but he was found not guilty of conspiring to unlawfully store explosive materials. All defendnats have appealed and have raised numerous issues in briefs and oral arguments.

The court has carefully considered the issues raised by each of the appeallants and the responses of the Assistant United States Attorney. The court has also noted that the trial judge, Honorable William O Bertelsman, considered many of these issues and filed orders in disposing of them. We agree with

Judge Bertelsman that the conduct disclosed by the evidence is prohibited by 18 U.S.C. §842 and that the defendants were properly charged thereunder. We also agree with the ruling of the trial judge that the defendant Scharstein was not denied effective assistance of counsel at the trial. We conclude however, that the evidence was not sufficient to support a verdict beyond a reasonable doubt as to the defendant Miller with respect to the charge that he conspired to manufacture and deal in explosives without a license. The evidence was sufficient, however, to support the verdict that the defendant Miller conspired to transport and ship or cause to be transported and shipped explosive material sin interstate commerce.

Upon consideration of the entire reocrd on appeal together with the briefs and oral arguments of counsel the court concludes that the appeallants Walters and Scharstein have identified no reversible error in the proceedings and that the defendant Miller has demonstrated error only in his conviction

for engaging in the business of manufacturing or dealing in explosive materials.

The convictions of William Ledford Walters and Victor Forest Scharstein are hereby affirmed. The conviction of Robert Earl Miller for conspiring to transport and ship or causing to be transported and shipped explosive materials in interstate commerce is affirmed, and the conviction for engaging in the business of manufacturing ordealing in explosive materials is vacated. Since the judgment and commitment order identifies only the conviction for conspiring to manufacture and deal in explosive materials, the case is remanded to the district court for re-sentencing in the light of this court's conclusions.

ENTERED BY ORDER OF THE COURT

_____

Clerk

No. 83-5565

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America	Plaintiff/Appellee
-v-	
Robert Earl Miller	Defendant/Appellant

Decided and Filed 22 May 1984

BEFORE: LIVELY, Chief Judge; CONTIE, Circuit Judge and WEICK, Senior Circuit Judge.

No judge in regular active service on the court having moved for en banc consideration of the petition for rehearing filed herein by the defendant-appellant, Robert Earl Miller, the petition has been referred to the hearing panel. Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of this appeal and rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

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